88-1025

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

THOMAS R. LARKINS AND
HERBERT M. LARKINS,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Counsel for Petitioners

QUESTIONS PRESENTED

I. Whether an isolated and unrepeated instance of the presence of vegetation that requires saturated soil conditions for growth and reproduction is sufficient, in and of itself, to satisfy the criteria of "normal circumstances" necessary to classify an area as "wetlands?"

II. Whether a row crop farmer, tree farmer, or rancher, or, as in this case, a farmer who must wear all three hats to survive, may change from one wetland farming or ranching activity to another wetland farming or ranching activity without the necessity of obtaining a Section 404 permit from the Corps of Engineers?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

The following is a list of all parties to the proceeding in the United States Sixth Circuit Court of Appeals whose judgment is sought to be reviewed:

1. Thomas R. Larkins and Herbert M. Larkins (individuals and petitioners herein);

2. United States of America (respondent herein).

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Thomas R. Larkins and Herbert M. Larkins, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Cir-

cuit entered in the above-entitled case on July 22, 1988, rehearing denied September 19, 1988.

OFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The Memorandum Opinion and Order of Judgment, U.S. District Court, dated January 16, 1987 (Documents No. 75 and 76), printed in Appendix A hereto, infra, p. A1, is reported in 657 F. Supp. 76. The Opinion of the Circuit Court of Appeals is printed in Appendix B hereto, infra, p. B1. The Order of the Circuit Court of Appeals denying petitioners' Motion for Rehearing, is printed in Appendix C hereto, infra, p. C1.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 22, 1988 (Appendix B, infra). A timely Petition for Rehearing was denied on September 19, 1988 (Appendix C, infra). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

This Petition concerns the Clean Water Act, 33 U.S.C. Sections 1251 et seq. dealing with the farm, ranch, and silviculture exemption contained in 33 U.S.C. Section 1344(f)(1)(A), the 1977 definition of wetlands in 33 C.F.R. Section 323.2(c) (1978), and the applicability of the 1982 Regulation, 33 C.F.R. Section 323.4(c) to a violation alleged to have occurred in 1980.

33 U.S.C. Section 1344(f):

> "(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material -
> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
> * * *
> is not prohibited by or otherwise subject to regulation under this Section..."

33 C.F.R. 328.3(b) [formerly 33 C.F.R. 323.2(c)]:

> "(b) The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vege-

tation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."

33 C.F.R. 323.4(c) adopted July 22, 1982:

"[A] permit will be required for...the conversion of a wetland from silviculture to agricultural use when there is a discharge of dredged or fill materials into waters of the United States in conjunction with the construction of dikes, drainage ditches or other works or structures used to effect such conversion."

STATEMENT OF THE CASE

Petitioners are life-long farmers engaged in all phases of farming, including the growing and harvesting of row-crop, timber, cattle, hogs, and pond-fish (H. Larkins at Tr. 4-27).

In 1976 petitioners purchased approximately 550 acres in Western Kentucky for use in their farming activities (T. Larkins at Tr. 4-78). Approximately 110 acres were in a bottomland area adjacent to a small creek known as Obion Creek which would occasionally overflow but would generally drain off within a 12-hour period (Mix at Tr. 4-186). Such bottomland had continuously been used as farmland, including growing

and harvesting of crops and timber from 1924 until the late 1960's or early 1970's (Mix at Tr. 4-185).

Beaver, unnatural to the area but imported by State officials, first appeared in the area in question in approximately 1972 and gradually began interfering with the drainage in the bottomlands along Obion Creek (Tyler at Tr. 4-179; Mix at Tr. 4-187, 188, D. Ex. 16).

In the Winter of 1976, petitioners observed that a 10-12 acre area near the center of the bottomland had water backed up on it as a result of the beaver dams interfering with the natural drainage and causing upland trees of hickory, oak, ash and sycamore to begin dying (T. Larkins at Tr. 4-79, 80). This conclusion of beaver activity causing damage was also made by the State forestry service (H. Larkins at Tr. 4-27).

In December, 1976, petitioners hand-dug a 60- 70-foot ditch, successfully drained all of the bottomland area and revealed the offending beaver dams (H. Larkins at Tr. 4-33, 34) which were then removed by dynamite and the natural drainage of the area was restored (H. Larkins at Tr.4-37, 38).

The temporary obstruction was removed and good natural drainage completely restored and continuously maintained, free from such artificial obstructions, for four years before petitioners allegedly deposited materials in "wetlands".

In 1977, petitioners continued the historical use of the land in harvesting timber, including that timber damaged by the beaver but still commercially saleable (T. Larkins at Tr. 4-85).

As commercial timber was harvested and sold from an area, petitioners made the farming decision based on then current farm economics to replant that area in row crops rather than in timber (T. Larkins at Tr. 4-90, 91). In order to cultivate the row crops, the root wads and stumps of harvested trees were removed (T. Larkins at Tr. 4-90, 91).

Eight years after the natural drainage of the land had been restored and row crop farming had been established, and four years after petitioners built their farm pond, the United States filed its Complaint against petitioners contending that petitioners violated the Clean Water Act, 33 U.S.C. Sec.

1311(a) by constructing earthen terraces and levees in 1980 in the bottomland area of petitioners' farm adjacent to Obion Creek, which the United States contended was "wetlands."

Petitioners admitted construction of the pond, its' terraces and levees but maintained that at the time of the alleged violation no "wetlands" existed on their farm. Petitioners contended that the area was well-drained bottomland and did not meet the criteria for "wetlands" established by the United States Corps of Engineers as defined in 33 C.F.R. 323.2(c), infra, and as then interpreted by the then leading case of Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983).

In the alternative and assuming wetlands meeting the Corps' written criteria could be shown in the area, petitioners contended that their activities in changing from one crop to another did not require a permit under the farm exemption of 33 U.S.C. Sec. 1344(f), infra. Since the land in question had been continuously used for the raising and harvesting of food, fiber, and forest products, the continued use of such land by

petitioners in either of these three categories fell within the explicit terms of the farm exemption.

As proof of the evidence of wetlands on the property in 1980, the District Court in a bench trial (decided January 16, 1987), stated that it relied exclusively on aerial photographs and soil analysis for it's determination of vegetation and hydrology (M.O. at p. 6) apparently excluding all testimony of farmers who had lived on the property and neighboring farmers who had been familiar with the property for approximately 50 years.

The aerial photographs, taken at one instant on one day in 1980, showed certain pot holes and scattered low areas to contain water. The Corps was neither aware how long the water had been on the property nor how quickly it drained off after the photograph was taken (Keller at Tr. 3-49).

No evidence was introduced as to what were the "normal circumstances" experienced by that area. (No evidence of the extent of rainfall in the area and no evidence of any flooding in the area other than petitioners' witnesses who testified that

flooding was only occasional during wet years and that natural drainage took off all surface water within a matter of hours (Mix at Tr. 4-186)).

The District Court found the government had proven "that a prevalence of the plants growing on the site prior to 1980 were adapted to saturated soil conditions" (M.O. 12). This conclusion was based solely upon the "signature thing" in which respondent's witnesses noted "similarities" in color, texture, shade, and tint between aerial photographs of the subject property and other areas which the Corps had designated wetlands, but without being able to identify what types of vegetation were actually prevalent (Parsons at Tr. 4-8, 9).

Although all of the evidence indicated that petitoners continually used the property for silviculture, ranching and row cropping from 1976 through and including 1980, the date of the alleged violation, the District Court found that the row-crop farming activity in 1980 was a use to which the land had not previously been put and thus denied petitioners the protection of the farm exemption (M.O. 14, 15).

Petitioners appealed, first, on the ground that some evidence of hydrology showing "normal circumstances" of the area must be presented to show that the presence of wetland vegetation is not merely abnormal growth in otherwise well-drained farm land.

Petitioners also appealed on the ground that the uncontradicted evidence of farm use of the land, regardless of the TYPE of crop, from 1976 through and including 1980, the date of the alleged violation, removed the objection that the use in 1980 was "a use to which the site was not previously subject" (M.O. 14).

The court below affirmed the findings of the District Court on the first ground utilizing the authority of United States v. Riverside Bayview Homes, Inc., infra., for the proposition that evidence of hydrology and normal circumstances no longer need be considered in determining what is or is not wetlands, and, for the second ground, utilized Avoyelles Sportsmen's League, Inc. v. Marsh, supra, and 33 C.F.R. Section 323.4(c) as authority for the prohibition against converting silviculture to

agricultural use which regulation was not adopted by the Corps until 1982, two years AFTER the alleged violation.

REASONS FOR GRANTING THE WRIT

1. The elimination by this Court in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S.Ct 455, 88 L.Ed.2d 419 (1985) of the qualifying term "under normal circumstances" as it previously existed under the definition of "wetlands" (33 C.F.R. Section 328.3(b)) has resulted in bringing millions of additional square miles of land under the jurisdiction of the Corps of Engineers.

District Courts and Federal Courts of Appeals had consistently approved the "three-prong test" for determining the presence of wetlands: (1) The type of soil, (2) the degree and frequency of inundation and saturation, and (3) the type of predominant vegetation.

The second criteria was set forth logically in Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983), supra, at page 913:

> "Similarly, the definition provides that a wetland is an area that 'under normal circumstances (does) support' vegetation typically adapted for life in 'saturated soil conditions.' It would seem that the logical method for determining whether this requirement is met is to examine whether the soil is or is likely to be frequently saturated."

The importance of evidence of hydrology to the determination of what the normal circumstances are is also set forth on page 913:

> "The definition speaks of areas that are inundated or saturated 'at a frequency and duration sufficient to support' the wetland indicators. We fail to understand how the agency may determine whether a tract is such an area without examining its hydrology."

This Supreme Court considered the importance of hydrology in Riverside Bayview Homes, supra, and, apparently in an effort to emphasize the deletion of the requirement of "periodic inundation" or "frequent flooding" also deleted any

reference to the "normal circumstances" of the area. At page 129, this Supreme Court stated:

> "Indeed, the regulation could hardly state more clearly that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to and does support wetland vegetation."

As an apparent reinforcement of the fact that the normal circumstances of hydrology are of no concern in a determination of wetlands, this Court stated at page 130:

> "The District Court found that respondent's property was 'characterized by the presence of vegetation that requires saturated soil conditions for growth and reproduction,' App. to Pet. for Cert. 24a, and that the source of the saturated soil conditions on the property was ground water. There is no plausible suggestion that these findings are clearly erroneous, and they plainly bring the property within the category of wetlands as defined by the current regulations."

However, this definition is contrary to the Court's specific recitation of that current regulation set forth on page 7 of the Opinion:

> "Wetlands, in turn, are defined as lands that are 'inundated or saturated by surface or ground water at a frequency and duration sufficient to support, AND THAT UNDER NORMAL CIRCUMSTANCES DO SUPPORT, a prevalence of vegetation typically

> adapted for life in saturated soil conditions.' 33 CFR Section 323.2(c) (1985)." (Emphasis supplied)

"Normal circumstances", while not "requiring inundation over a record period of years" (41 Fed. Reg. 37128, Corps' reference to the reason for deleting a requirement of "periodic inundation") must require some showing of normalcy of the circumstances which are found to exist. Whether the growth of wetlands vegetation in an area is "normal" or "abnormal" is derived from a showing of what has been regularly occuring in that area. If it is normal for a prevalence of wetland vegetation to be present then some evidence of regeneration should be shown. If it is normal for wetland vegetation to be present, then its prevalence for at least more than one season should be shown.

The Riverside Bayview Homes case, supra, has been accepted by the Sixth Circuit as tantamount to deleting all reference to "normal circumstances" in the Corps' definition of wetlands. As stated by that Circuit in its Opinion of the instant case at page 6:

" In United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985), the Supreme Court rejected the notion that 33 C.F.R. Section 328.3(b) required that land be frequently inundated to be considered wetlands and concluded that the regulation's only requirement was that 'the saturation is sufficient to and does support wetland vegetation.' 474 U.S. at 130, 106 S.Ct. at 461. The presence of vegetation that requires saturated soil conditions for growth and reproduction on land adjacent to a body of navigable water is sufficient to bring the land under the regulation's definition of 'wetlands.' 474 U.S. at 130-31, 106 S.Ct. at 461."

The First Circuit in United States v. Cumberland Farms, 826 F.2d 1151 (1st Cir. 1987) has also deleted the "normal circumstances" requirement on the authority of Riverside Bayview Homes, supra. At page 1154 the First Circuit stated:

"In 1977, the Corps further extended its jurisdiction over wetlands by eliminating the requirement that the wetland be periodically inundated, requiring only that it be inundated or saturated by surface or groundwater at a sufficient frequency to support vegetation adapted for life in saturated soils. Id. at 458; 33 C.F.R. Section 323.2(c)(1978). In Riverside Bayview Homes, the Supreme Court upheld the Corps' expanded view of its regulatory authority over freshwater wetlands under the Clean Water Act. Id. at 465."

As pointed out in the concurring opinion of Circuit Judge Merritt in the instant case on page 10, referring to the Riverside Bayview Homes decision:

> "There we said: 'Under such a construction [as proposed by the Corps of Engineers] low lying backyards miles from a navigable waterway would become wetlands'.....A farmer's low lying farmland or a homeowner's low lying backyard - adjacent to a small stream or creek but many miles from any navigable waterway - has apparently been converted into government property no longer subject to control or improvement by the owner without government permission. A statute that does not mention 'wetlands' has apparently been read to include simply 'moist land adjacent to a creek.'
>
> "The framers of the Constitution were solicitous of the rights of landowners - especially small farmers struggling for survival - not to have land appropriated by the government."

2. There exists conflicting decisions among the Federal Courts of Appeal relating to the provisions of the "farm exemption" under the Clean Water Act, resulting in confusion and leading farmers into potential unknowing violations of law.

While it was uncontradicted that these petitioners were harvesting and selling their timber from the property in question during 1977 and later, and that the property had been

historically used for silviculture, the District Court found that the change to another crop constituted "a use to which the site was not previously subject." (M.O. 14) The Sixth Circuit cited 33 C.F.R. Section 323.4(c) which excluded from the farm exemption the right to convert from wetland tree farming to wetland crop farming, which Regulation was not adopted until two years after the alleged violation by these defendants (i.e. July 22, 1982).

The Ninth Circuit Court of Appeals in United States v. Akers, 785 F.2d 814, 816 (9th Cir. 1986) considered an injunction suit by the United States against a farmer "..who seeks to farm his wetlands more productively.." The farmer defended on the basis of the farm exemption which the Ninth Circuit quoted in pertinent part at page 819:

> "To fall under this exemption, the activities...must be part of an established (i.e., on-going) farming, silviculture, or ranching operation."

Although affirming the injunction based on its unique facts, the Court stated at page 820:

> "Responding to our inquiries, government counsel asserted that the Corps would require Akers, and

> other farmers like him, to obtain a Section 404 permit before switching from one TYPE of wetland crop to another, if the new crop had not been farmed previously. For example, if Akers desired to plant wild rice, a wetland crop, the Corps would require a permit since rice has not been farmed in Big Swamp in the past.
>
> ".....we do not endorse the government's authoritive position. We do not believe that Congress intended to place the burden of Corps permit regulation on farmers who desire merely to change from one wetland crop to another."

In the instant case all of the uncontradicted testimony was to the effect that the site had continuosly been used for silviculture with crops interspersed in areas where trees had not been replanted. Further, such testimony indicated that petitioners did nothing more than continue the normal silviculture activities with the exception that instead of replanting in trees after normal harvesting, the economic decision was made to go to a new crop of maize, corn, and soybeans, all of which flourished under natural conditions as well or better than commercial timber. The Corps offered no testimony to rebut that conclusion.

The District Court ignored petitioners' use of the area for cropland from 1977 until the alleged violation of 1980 and stated without any supporting evidence whatsoever that the site had not been previously used for cultivation until the pond and dikes were constructed in 1980.

The Sixth Circuit rested its decision on the basis that when petitioner farmers harvested timber it was not a "normal harvesting of timber," but rather an activity of clearing timber as in Avoyelles Sportsemen's League, Inc. v. Marsh, supra.

However, the Fifth Circuit in Avoyelles, supra, in relating the facts of "clearing timber" noted at page 901:

> "Consequently, they began a program of large-scale deforestation in June of 1978. Using bulldozers with shearing blades that 'floated' along the ground, the defendants cut the timber and vegetation at or just above ground level. The trees were then raked into windrows, burned, and the stumps and ashes were disced into the ground by other machinery.....The court allowed the private defendants to engage in normal cultivation on the more than 10,000 acres that had been cleared, but ordered them to apply for a permit with respect to the area already designated by the government as a wetland...."

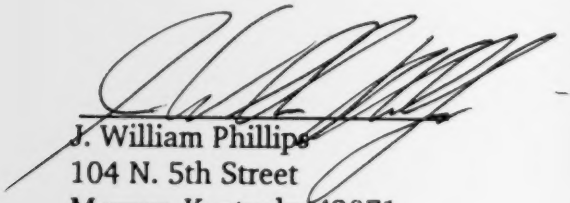
While the Ninth Circuit does not agree with the Corps' conclusion that a wetland crop may not be changed to another wetland crop, the Sixth Circuit adopts a variation of the Corps' conclusion as it applies to changing from timber cultivation in wetland to cultivating another type of wetland crop (33 C.F.R. Section 323.4(c)).

Although the "farm exemption" permits all silviculture, agricultural, and ranching uses, farmers in the Ninth Circuit can change crops in wetland areas, while farmers in the Sixth Circuit have limitations placed upon the type of crops to which they may change without applying for and receiving a Corps Section 404 Permit.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

UNITED STATES OF AMERICA,

PLANTIFF,

v. CIVIL ACTION
No. 84-0044-P(J)

THOMAS R. LARKINS and
HERBERT M. LARKINS,

DEFENDANTS.

MEMORANDUM OPINION

This action arises out of alleged violations of Section 301 (a) of the Clean Water Act (CWA), 33 U.S.C. § 1311 (a), which prohibits the discharge of pollutants into "navigable waters" -- defined as the "waters of the United States" and including freshwater wetlands adjacent thereto[1] -- unless authorized by a permit issued by the Army Corps of Engineers (Corps) pursuant to Section 404, 33 U.S.C. § 1344. The United States contends that Defendants Thomas R. and Her-

[1] 33 U.S.C. § 1362(7); see note 2, infra.

bert M. Larkins, brothers who own and operate a farm in Carlisle County, Kentucky, constructed earthen dikes and levees on wetlands adjacent Obion Creek without a permit, damaging aquatic environment and causing harm to fish and wildlife resources.[2] In remedy of these violations, the United States

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2 The property in question, which is described in Book 70, page 332, Office of the Clerk of Carlisle County, Kentucky, lies north of Obion Creek, south of Highway 80 and approximately three mile east of U.S. Highway 51, and is within the flood plain of Obion Creek, a tributary of the Mississippi River. Tributaries of navigable rivers are "waters of the United States" over which the Corps exercises jurisdiction for the purpose of enforcing the CWA. 40 C.F.R. § 230.3(s)(5). The term "waters" also encompasses wetlands adjacent to rivulets like Obion Creek. United States v. Riverside Bayview Homes, --U.S.--, 106 S. Ct. 455, 461-466 (1985). Consequently, if the property on which the Larkins constructed dikes and levees contained wetlands, the Corps had authority to regulate the discharge of any pollutants thereon.

In an Order entered January 8, 1986, this court found that the Larkins erected dikes and levees with earthmoving equipment. Earthmoving equipment constitutes a "point source" -- i.e., an instrumentality through which pollutants can be introduced into waters of the United States -- under Section 502(14) of the CWA, 33 U.S.C. § 1362(14). The court further found that the dikes and levees were made of earth. Earth, when used as a fill material in the construction of structures such as impoundments or dikes on wetlands, constitutes a "pollutant" under the CWA. See Section 502(6), 33 U.S.C. § 1362(6); 33 C.F.R. § 323.2(k) and (l); United States v. Weisman, 489 F. Supp. 1331, 1336-1337 (M.D. Fla. 1980), aff'd 632 F. 2d 891 (5th Cir. 1980). See also Minnehaha Creek Watershed District v. Hoffman, 597 F. 2d 617, 625-626 (8th Cir. 1979). Consequently, if the Larkins' property contained wetlands, the use of earthmoving equipment to construct earthen dikes and levees thereon constituted a discharge of pollutants into waters of the United States, an act prohibited without a permit unless statutorily exempted from the Corps' control. See page 15, infra.

Although the Larkins deny their property contained wetlands, they have not challenged the legal consequences of such a finding. Consequently, if their property contained wetlands, and if construction of dike and levees thereon does not qualify for a permit exemption, the Larkins are liable for violations of the CWA.

seeks restoration of the site, a permanent injunction against future violations of the CWA, and imposition of a $20,000 penalty under 33 U.S.C. § 1319(b), (d).

The Larkins, who acquired title to the site in 1976, do not deny constructing the dikes and levees. Nor do they claim ignorance of the permit requirement.[3] Rather, they argue that the property in question does not contain wetlands as defined by 33 C.F.R. § 323.2(c)[4], and that even if it does, their use of the land qualifies for a permit exemption under 33 U.S.C. § 1344(f).[5]

This matter was tried before the court without a jury on January 14-15, 1986. At trial, the United States called six witnesses qualified as experts in soil analysis, surveying, forestry, wildlife biology, and wetland delineation. The defense called the defendants, two neighboring farmers, and an expert

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[3] The Government's complaint alleges that permit violations began in 1978 when the Larkins were arguably unaware of the CWA's permit requirement. In pretrial stipulations, however, the parties agreed that the instant action addresses only those violations alleged to have occurred in or after 1980 by which time the Larkins were fully aware of the Act.

[4] See page 5, infra.

[5] See page 15, infra.

botanist. Approximately 50 exhibits were introduced including correspondence between the parties, photographs of the disputed site, experts' reports, and technical materials used by the Corps in identifying wetlands. The court, having studied the parties' arguments and reviewed the evidence, enters these findings of fact and conclusions of law in accordance with Rule 52(a) of the FEDERAL RULES OF CIVIL PROCEDURE. To the extent that these findings of fact constitute conclusions of law, they are adopted as such, and to the extent that the conclusions of law constitute findings of fact, they are so adopted.

I. FINDINGS OF FACT

A. HISTORY OF THE SITE

The record contains a detailed history of the parcel on which the Larkins constructed their dikes and levees. The Larkins acquired the site in 1976 with the purchase of a 550 acre tract lying along Obion Creek. At the time of purchase, Thomas Larkins observed that as many as 10 to 12 acres of the

site were covered knee-deep with water. He noted the presence of oak, hickory, and other bottomland hardwoods, but also observed cypress on the site. After inspecting the inundated parcel, Larkins concluded that beaver, reintroduced to the area in 1950 by the Kentucky Department of Fish and Wildlife Resources, were responsible for poor drainage.

After acquiring the property, the defendants dug drainage ditches, cut back dead and damaged timber, blasted out beaver dams and lodges, and began filling gullies and washouts. Site improvements continued without interruption until May 9, 1979, when Mr. L.D. Blanchard, an attorney for the Corps, requested permission to make an inspection. Blanchard's verbal request was followed by a written one (Plantiff's Exhibit 3) to which Defendant Thomas Larkins responded in writing on June 28, 1979: "We will let two men from the Corps come on a part of our land if one of them is the BOSS [and if] he can answer my questions." Plantiff's Exhibit 4.

On July 31, 1979, the Corps dispatched Colonel William H. Reno to meet with the Larkins and a group of neighboring

landowners in Carlisle County. After explaining the Corps' enforcement responsibilities under the CWA, Reno renewed the inspection request. The Larkins refused, informing Reno that they would consider the request only after he divulged the identity of the person responsible for reporting their activities to the Corps. Reno rejected the Larkins' terms and, on November 23, 1979, informed them that the matter had been turned over to the Justice Department. Plantiff's Exhibit 8.

In 1980, ignoring the Corps' still pending inspection request, the Larkins began construction of a series of earthen dikes and levees. On February 1, 1982, the Corps notified Thomas Larkins that aerial inspection had revealed "unauthorized deposition of material into water of the United States," a violation of the CWA. Plantiff's Exhibit 10. Disregarding the Corps' objections, the Larkins completed construction of the dikes and levees, forming an 18 acre impoundment designed to capture upland drainage. Before construction of the dikes and levees, upland runoff often inundated the low lying lands adjacent to Obion Creek.[6] By creat-

ing the impoundment, the Larkins were able to cultivate formerly inundated lowlands.[7]

On February 10, 1984, after completion of the dikes and levees and almost five years after the Corps made its initial inspection request, the Justice Department filed an action against the Larkins in this court. Thereafter, the court ordered two on-site inspections of the Larkins' property, the first on August 30, 1984, and the second on May 29, 1985. The results of those inspections are discussed below.

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[6] See:

Plaintiff's Exhibit 19: aerial photograph made by the Soil Conservation Service in 1964. In this photograph, taken 16 years before construction of the dikes and levees, the future impoundment area appears less forested than the surrounding acreage.
Plaintiff's Exhibit 20: aerial photograph made by the Corps in 1972 again showing reduced density of mature timber on the lowland areas adjacent Obion Creek.
Plaintiff's Exhibit 22A and B: aerial photographs made by the Corps in 1979 showing the inundation of the site immediately before the construction of the disputed dikes and levees.
Plaintiff's Exhibit 23A, B, C, D: aerial photographs made in 1980. Pooled water and dying timber readily apparent.
Plaintiff's Exhibit 24A, B, C, D: aerial photographs showing inundation of the site in December of 1981.

[7] See:

Defendants' Exhibit 33: photograph, made in August 1984, showing successful cultivation of soybeans in a formerly inundated are
Plaintiff's Exhibit 25: aerial photograph made in September of 1984 showing completed dikes and levees and the impoundment area created thereby. The photograph also reveals cultivation of fields adjacent the impoundment area.

B. IDENTIFICATION OF WETLANDS

In 1972, with passage of the Federal Water Pollution Control Act Amendments, 86 Stat. 816, Congress empowered the Corps to issue regulations for enforcement of the CWA. The Corps' current regulations, which have survived scrutiny by the Supreme Court,[8] define wetlands as:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

33 C.F.R. § 323.2(c).[9] This definition centers on two essential indicia of wetlands: hydrology and vegetation.

In most instances of alleged violations of the CWA involving land adjacent to waters of the United States, the Corps is immediately admitted to the site to conduct hydrological and vegetation studies, thus enabling it to make a timely determination of whether wetlands are present. In a few instances,

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[8] United States v. Riverside Bayview Homes, --U.S.--, 106 S. Ct. 455 (1985).

[9] This definition is quoted from regulations issued in 1982. The language is identical to that used in the 1977 regulations which were in force at the time of the Corps' first contact with the Larkins.

however, vegetation is removed and drainage patterns are altered before the Corps can make an on-site inspection. In such instances, of which this case is one, other means must be called upon to determine whether wetlands were present on a site prior to the commencement of landowner improvements. Two of those means are soil analysis -- for determining the likely hydrology of a site prior to landowners alterations[10] -- and aerial photography -- for memorializing drainage patterns and vegetation types when a timely on-site inspection is not possible.[11] Because the Larkins refused to allow an on-site inspection before completion of the dikes and levees, the court's findings of fact regarding hydrology and vegetation are based on soil analysis and aerial photography.

1. HYDROLOGY

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[10] See Newling testimony, Transcript, Vol. 1, p. 51.

[11] Aerial photography has been recognized as a reliable substitute for on-site "prefill" vegetation tallies, United States v. Robinson, 570 F. Supp. 1157, 1161 (M.D. Fla. 1983), and has been used as a means of memorializing wetland growth for future comparison. Barcelo v. Brown, 478 F. Supp. 646, 685 (D.P.R. 1979), aff'd in part, vacated in part, 643 F. 2d 835 (1st Cir. 1981), rev'd on other grounds, 456 U.S. 305, 102 S. Ct. 1798 (1982).

Evidence of soil saturated by surface or ground water is essential for wetland identification. At trial, the Corps' experts testified that the impoundment area and areas east, northeast, and southwest thereof possess this hydrological characteristic.[12]

Aerial photographs, described *supra* note 6, attest to repeated inundation of the property prior to construction of the dikes and levees.[13] Soil analysis by Charles Newling, an expert presently in charge of training Corps personnel in the use of soil analysis for wetland identification, revealed that the impoundment area and the area lying southwest thereof con-

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[12] The appropriate location, shape, and size of the areas to the east, northeast, and southwest of the impoundment are depicted on Plaintiff's Exhibit 29. The impoundment and outlying areas affected by the dikes and levees encompass about 110 acres. Transcript, Vol. 4, p. 20.

[13] See, e.g., Plaintiff's Exhibit 24A, which shows water standing on the site of the impoundment area and also on the area east of the impoundment with water pooled on the area northeast of the impoundment. Plaintiff's Exhibit 24C shows water pooled on area southwest of impoundment.

The defendants argue that the Corps' investigation of the hydrological characteristics of their property is incomplete because the Corps' experts failed to determine the frequency and duration of inundation of the site. The Corps' regulations do not require such a finding; rather, the Corps need only prove that an area is "saturated...at a frequency and duration sufficient to support" a prevalence of wetland vegetation. 33 C.F.R. § 323.2(c) (emphasis added). In other words, if an area is sufficiently saturated to support wetland vegetation, the frequency and duration of the inundations which created the saturated conditions are irrelevant.

tained hydric soil. Hydric soil is a wetland soil type which is low in oxygen and formed under saturated conditions.[14] Because wetland plants, which require less oxygen than their upland rivals, are uniquely adapted for growth in hydric soil, Newling's soil analysis is a strong, though not conclusive, indicator that the impoundment and southwest areas are wetlands.[15] Although Newling was unable to perform soil tests in

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[14] The Memphis District's Wetland Identification and Classification Guidelines for Section 301 of the Clean Water Act of 1977, as revised by the Corps in December 1980, states that "wetland soils are hydric soils [which], for a significant portion of the growing season, are virtually free of dissolved oxygen in the major portion of the root zone.... Hydric soils thus tend to support vegetation typically adapted for life in saturated soil conditions." Defendants' Exhibit "Keller B" at 11; Transcript, Vol. 2, p. 10.

During the August 30, 1984, inspection, Newling made ten soil tests around the perimeter of the impoundment area. Tests on the north, east, and west sides of the impoundment --holes A, B, C, D, H, I, and J on Plaintiff's Exhibit 25-- revealed hydric soil. Tests along the southern side of the impoundment --holes E, F, and G-- uncovered non-saturated soils. The characteristics of soil change very slowly, see infra note 15; consequently, the presence of non-saturated soil on the southern border of the impoundment does not necessarily exclude the site from classification as a wetland. Aerial photographs show that the site was often inundated. If the inundations were of sufficient frequency to support wetland vegetation, the southern side of the impoundment was wetland.

During the May 29, 1985, inspection, Newling made nine additional soil tests centered on the area southwest of impoundment area. Only one of ten suggested non-saturated soil. Newling observed silt marks on the trunks of trees in this area indicating flooding. Transcript Vol. 1, p. 66. And, on cross-examination, Thomas Larkins confirmed that, prior to erection of the levee which separates the southwestern area from the impoundment, run-off water from the northeastern area would flood the southwestern area. Transcript, Vol. 4, p. 70-71.

[15] On cross-examination, Mr. Newling admitted that soil composition

the areas east and northeast of the impoundment, a soil analysis by Thomas Welborn, an expert for the Environmental Protection Agency (EPA), revealed that the eastern area contained hydric soil, and a soil survey made by the United States Department of Agriculture's Soil Conservation Service in 1937 attests that hydric soil types dominate the northeastern area.[16]

Although the defendants presented no expert challenge to the Corps' soil analysis, the defendants did present testimony from two individuals -- Messrs. W.R. Tyler and M.H. Mix -- who had witnessed inundation of the property for fifty years. The testimony of these witnesses in no way impeached the conclusions of the Corps' experts regarding the predominance of saturated soil types on the site.

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changes gradually. So gradually, in fact, that upland soil may be inundated for centuries without losing its upland chemistry. Transcript, Vol. 2, pp. 24-25, 32-34. By the same token, the hydric soil on the Larkins' property could have been cultivated for decades, but it would still appear hydric when analyzed. Id., p. 23. Given the glacial pace at which soil types change and the fact that recent changes in land use are not reflected by soil analysis, Newling's finding that hydric soil predominates on the Larkins' property is not, by itself, a sufficient basis upon which to declare that the impoundment and surrounding areas are wetlands. A corroborative finding of wetland vegetation is required.

16 See Plaintiff's Exhibit 26; see also Transcript, Vol. 1, pp. 72-81.

Where experts present unequivocal, uncontradicted, unimpeached testimony on a technical matter beyond the competence of lay determination, a court cannot lightly disregard the experts' conclusions. *Webster v. Offshore Food Service, Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970); *Stafos v. Missouri Pacific Railroad Company*, 367 F.2d 314, 317 (10th Cir. 1966). When, as here, those conclusions are presented by officials charged with the administration and enforcement of the CWA, they are entitled to even greater deference. *United States v. Lambert*, 589 F.Supp. 366, 370 (M.D. Fla. 1984). Consequently, the court finds that the impoundment area and areas east, northeast, and southwest thereof possessed hydrological characteristics typical of those associated with wetlands.

2. VEGETATION

The Corps' regulations state that, under "normal circumstances," wetlands support "a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 323.2(c). Normal circumstances end when a land-

owner's activities modify the hydrological conditions of a site, and ended on the Larkins' property in 1980 with construction of the dikes and levees. Thus, to determine whether the Larkins' property supported a prevalence wetland vegetation under normal circumstances, the court must determine what type of vegetation dominated the site prior to construction of the dikes and levees.

The Larkins refused to allow inspection of their property prior to construction of the dikes and levees; consequently, no on-site vegetation tally exists for the critical period before 1980. There being no prefill, on-site vegetation tally, the court must rely on aerial photographs to determine what type of vegetation formerly dominated the site.[17]

At trial, experts trained in wetland identification and photo interpretation testified that aerial photographs made in 1980 indicated a prevalence of wetland vegetation on the 110 acre site affected by the Larkins construction activities. Transcript, Vol. 3, pp. 24, 112. Although the experts conceded that

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[17] See notes 6 & 11, supra.

conclusive identification of particular plant species could not be made on the basis of the aerial photographs, they informed the court that the "signature" of the vegetation in the photos -- its color, shading, tint and texture -- indicated a prevalence of wetland vegetation on the site. *Id.* Using Plantiff's Exhibit 23B, one of the aerial photographs made in 1980, expert Martin Keller was able to identify "an area of black willow, button bush and several species of herbaceous aquatic and semi-aquatic plants," all typically associated with wetlands. Transcript, Vol. 3, p. 24. Keller also noted that the photograph was "typical of the many thousands of similar sites that we have seen over the last 10 years of areas such as this, and in every case these areas have been classified as wetlands." *Id.* An on-site vegetation tally made by EPA's Thomas Welborn in 1984 after completion of the dikes and levees confirmed Keller's conclusion. During that inspection, Welborn located an area of undisturbed vegetation north of the impoundment. The undisturbed area was dominated by wetland plant species and its signature matched the signature of the vegetation

extending "from the impoundment basically up to the east, northeast of the property" in the 1980 photographs. Transcript, Vol. 3, pp. 110,111-112, 116. By these means, plantiff's experts established that a prevalence of wetland vegetation grew in the impoundment area and in areas east and northeast thereof prior to construction of the dikes and levees.

In May 1985, David Parson, a wildlife biologist for the Fish and Wildlife Service, joined experts Keller and Welborn in making a vegetation tally for the area lying southwest of the impoundment. *See* Transcript, Vol. 3, p. 34-35. With the exception of two narrow ridges where the predominant vegetation consisted of trees not generally found in wetlands, the predominant vegetation on the southwest area was of a type requiring saturated soul conditions for growth, or which was adapted to and could tolerate such soil conditions. *Id.* at 39. By this means, plantiff's experts established that wetland vegetation prevailed on the area southwest of the impoundment.[18]

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[18] At trial, the defendants carefully cross-examined Martin Keller on the meaning of vegetation tally sheets completed during the 1985 inspection of

At trial, defendants' expert Prof. Otto Ohmart, Herbarium Curator at Southeast Missouri State University, introduced the results of a detailed floral survey made during an inspection of

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the area lying southwest of the impoundment. Transcript, Vol. 3, pp. 69-77; Plaintiff's Exhibit 15. The plants recorded on the tally sheets were organized in accordance with wetland identification guidelines authored by Keller. See note 14, supra. The guidelines divide plants into three groups:

> Group 1. These species are considered to be the most water tolerant woody species in the District. While the presence of these species on a site does not insure the presence of wetlands, these species are generally consistent as to the sites where they are commonly found (swamps, sloughs, and backwater flats).
>
> Group 2. This group includes those species that, while showing varying degrees of adaptation to life in saturated soil conditions, may also be commonly found on more mesic site which would not be considered wetlands.
>
> Group 3. These species may on occasion be found in wetlands, but are not considered to be typically adapted for life in saturated soil conditions (where these species are well established, wetlands are not present).

Defendants' Exhibit "Keller B" at 2; Transcript, Vol. 2, p. 64.

The vegetation recorded on the first tally sheet, which is summarized by group in Defendants' Exhibit "Keller A", shows a prevalence of Group 2 plants, followed, in order of prominence, by groups 3 and 1. Similar patterns of prominence were recorded on seven of sixteen additional tally sheets, but in each case the number of plants in groups 1 and 2, considered together, exceeded the number of plants in Group 3. In cross-examining Keller, the defendants sought to suggest that where Group 3 plants outnumber Group 1 plants, wetlands are not present, for, quoting, the Corps' wetland identification guidelines, "where [Group 3] species are well established, wetlands are not present." Defendants' Exhibit "Keller B" at 2. In authoring that classification system, however, Keller wrote that both groups 1 and 2 "include those woody species which are believed to be typically adapted for life in saturated soil conditions. In other words, tallies for both groups 1 and 2 should be combined when determining whether a site supports a predominance of plants adapted for life in saturated soil conditions. Defendants' Exhibit "Keller B" at 2; see also Transcript, Vol. 3, p. 75. Applying this standard with due reference to Keller's position as its author and best interpreter, the tally sheets establish a prevalence of wetland vegetation in the area southwest of the impoundment.

the area southwest of the impoundment on August 26, 1985. After analyzing five 50-foot-by-50-foot quadrants selected by the defendants, Ohmart concluded that mesic rather than saturated soils dominate the site and that "the area consists of a variety of plants typical of both upland and bottomland...[which] can survive in either place." Defendants' Exhibit 1.

Ohmart's first conclusion -- that mesic soil dominates the site -- is not based on actual soil analysis, but on an inference drawn from a reference work entitled *Flora of Missouri*. That work lists the *preferred* habitat of local flora but, by Ohmart's own admission, cannot be relied upon for determining the type of soil in which plants actually grow. Transcript, Vol. 4,

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Importantly, the Corps' guidelines "do not preclude the investigator from delineating as wetlands sites not dominated by Group 1 species. However, the field investigator should properly document that presence of hydric soils, any available background on hydrologic conditions and any other information that would support the conclusion reached." Defendants' Exhibit "Keller B" at 13. Plaintiff's field experts followed this guideline in confirming their wetland findings by soil analysis. Thus, although the vegetation tallies from the area southwest of the impoundment showed a dominance of Group 2 rather than Group 1 species, that area was property delineated as wetlands supporting a predominance of vegetation adapted to saturated soil conditions.

pp. 146, 167-168. Ohmart's second conclusion -- that much of the vegetation on the site can survive in both uplands and bottomlands -- is consistent with the Government's findings, for many plants "adapted for life in saturated soil conditions" can also survive in unsaturated soils. *See* note 18, *supra*. Thus, the defendants' expert does not refute the plantiff's evidence that the area southwest of the impoundment contains wetlands.

The Larkins' failure to establish the hydrological characteristics of the site through soil analysis coupled with their failure to classify plants on the basis of ability to adapt to saturated soil conditions rather than on the basis of preferred habitat belies a failure to understand the Corps' criteria for wetland identification, criteria which control the deliberations of this court. The Larkins' argument is straightforward: upland plants prefer well drained soils; the southwest area contains upland plants; therefore, the southwest area is well drained and does not support vegetation adapted for life in saturated soil conditions. In offering the environmental

preferences of upland plants as conclusive evidence of well drained soil incapable of supporting wetland vegetation, the defendants ignore the plantiff's soil analyses and vegetation tallies.

C. FINAL FINDING OF FACT

As discussed earlier, Congress empowered the Corps to issue regulations establishing criteria for wetland identification.[19] A court must faithfully apply those criteria and may not substitute its own or those of a defendant when considering a question of wetland delineation. See *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 843-844, 104 S. Ct. 2778, 2782 (1984). The United States has proved each of the wetland elements described in 33 C.F.R. § 323.2(c) for each of the four areas affected by construction of the dikes and levees in 1980. The Larkins, however, have not challenged the plantiff's expert soil analyses, nor have they presented evidence which overcomes the Government's proof

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19 See page 6, supra.

that a prevalence of the plants growing on the site prior to 1980 were adapted to saturated soil conditions and that a prevalence of such vegetation still exists on the area southwest of the impoundment. Accordingly, the court finds that the United States has proved, by a preponderance of the evidence[20] that the impoundment area and the areas east, northeast, and southwest thereof are wetlands.

II. CONCLUSIONS OF LAW

The property on which the Larkins constructed the dikes and levees and the adjoining property affected by that construction are wetlands. Wetlands are a part of the waters of the United States which are protected by the CWA. *United States v. Riverside Bayview Homes*, --U.S.--, 106 S. Ct. 455, 461-466 (1985). The CWA prohibits discharges of pollutants into waters of the United States without a permit from the Corps,

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[20] The burden of persuasion on the Government in a wetlands case is proof by a preponderance of the evidence. United States v. Lambert, 589 F. Supp. 366, 370 (M.D. Fla. 1984), citing United States v. Ward, 448 U.S. 242, 248, 100 S. Ct. 2636, 2641 (1980) and United States v. Regan, 232 U.S. 37, 47, 34 S. Ct. 213, 216, (1914).

33 U.S.C. § 1311(a). The use of earthmoving equipment to construct earthen dikes and levees on wetlands constitutes a discharge of pollutants into waters of the United States for which a permit is required.[21] The Larkins did not secure a permit prior to construction of the dikes and levees which formed the impoundment. Consequently, that construction qualifies for a statutory exemption to the permit requirement, the Larkins violated the CWA.

III. THE FARM EXEMPTION

The United States has proven a prima facie violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). The burden of proof now shifts to the defendants[22] to show

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21 See note 2, supra.

22 Although no court has ruled on which party bears the burden of proof when an exemption is claimed under 33 C.F.R. § 323.4, a review of federal cases reveals that the burden of proving an exemption to a regulatory statute is consistently placed on the party who claims the exemption. See Lawson v. Valente, 456 U.S. 228, 255 n.30, 102 S. Ct. 1673, 1689 n.30 (1982) (parties claiming an exemption from regulatory statutes may be required to prove they qualify); U.S. v. An Article of Device, 731 F. 2d 1253, 1262 (7th Cir. 1984) (burden of proving an exemption is on the defendant if government access to information has been limited); Ray v. Turner, 587 F. 2d 1187, 1194 (D.C. Cir. 1978) (government bears burden of proving exemption from provisions of Freedom of Information Act); Gen'l Life of Missouri v.

that their construction activities qualify for an exemption under 33 U.S.C. § 1344(f), which states:

> (1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material --
>
> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices; [or]
>
> (C) for the purpose of construction and maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
>
> ...
>
> is not prohibited by or otherwise subject to regulation under...section 301(a)...of this Act....
>
> (2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject; where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

Shamburger, 546 F. 2d 774, 781 (8th Cir. 1976) (defendant bears burden of proving statutory exemption from provisions of a remedial statute). Given the limited access plaintiff's experts had to the Larkins' property and acknowledging the remedial nature of the Clean Water Act --"The objective of the Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters," 33 U.S.C. § 1251 (a) --the burden of proving an exemption falls on the defendants.

The Larkins claim exemptions for harvesting forest products, for promoting upland soil conservation, and for construction of a stock pond. They are not entitled to those exemptions. They constructed the dikes and levees for the purpose of bringing the wetlands adjacent Obion Creek under cultivation, a use to which the site was not previously subject.[23] In clearing and cultivating that acreage, the defendants reduced the reach of wetlands, thereby reducing the reach of the navigable waters of the United States.[24] Consequently, the defendants' activities do not qualify for a farm exemption,

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[23] The Corps' regulations clarify a question raised in the defendants' post trial briefs: If the wetlands were cultivated or logged before beaver entered the region and interfered with drainage of the property, are cultivation and silviculture not uses to which the land was previously subject? The answer is no, for activities subject to the farm exemption qualify for exemption only if they are established and "on-going". 33 C.F.R. § 323.4(a)(1)(ii). Activities cease to be established when the property on which they were once conducted "has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations ...." Id. (emphasis added). Reducing the reach of the Obion wetlands required modification of the site's hydrological regime. Consequently, even if the wetlands had a history of farm use, that use was no longer established at the time the Larkins' built the dikes and levees, and "reclamation" of the site brought "an area of the navigable waters into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2). Cf. 33 C.F.R. § 323.4(a)(1)(iii)(C)(2).

[24] See note 2, supra.

for they exceeded the limiting conditions imposed by 33 U.S.C. § 1344(f)(2).

IV. REMEDIES

The court finds that the construction of dikes and levees without a permit on wetlands adjacent Obion Creek violated 33 U.S.C. 1311(a), and further finds that the defendants' activities do not qualify for a farm exemption under 33 U.S.C. 1344(f). Having found a violation of the Clean Water Act, the court must order appropriate relief. The United States asks for restoration of the site, a permanent injunction against future violations, and imposition of a $20,000 penalty under 33 U.S.C. § 1319(b),(d).

The United States is entitled to restoration of the site. The Larkins were aware of the permit requirement before they began construction of the dikes and levees. Nevertheless, they elected to deny the Corps access to their property and proceeded with construction of the dikes and levees over the Corps' objections. The Larkins incur no liability for exercising

their right to refuse the Corps' entry onto their land; rather, they incur liability for acting in violation of the CWA, a violation which could have been adverted had they cooperated with the Corp.

Wetlands are considered an invaluable but dwindling natural resource. They improve the water quality of our streams, lakes. and rivers by trapping sediment, sewage, and other pollutants, and help stabilize erosion and support wildlife. Congress has determined that "the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage," damage so egregious that wetlands merit protection by laws like the CWA which promotes the restoration and maintenance of wetland resources. STAFF OF SENATE COMM. ON THE ENVIRONMENT, 95TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, 869-870 (Comm. Print 1978) (Statement of Sen. Muskie). For these reasons, the court concludes that interests of public policy will be served best by restoration of the site.[25] Accordingly, the court shall order the defendants to

carry out the restoration plan described by Plantiff's Exhibit 30.[26] The court will also impose a monetary penalty for violation of the CWA and will enter a permanent injunction prohibiting future modification of the site without permission from the Corps. An appropriate Order of Judgement encompassing these remedies shall be entered with this Memorandum Opinion.

DATED 1-16-87

(s) Edward H. Johnstone, Chief Judge
United States District Court

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[25] There are numerous precedents for restoration. United States v. Tull, 615 F. Supp. 610, 626-627 (E.D.Va. 1983), aff'd, 769 F. 2d 182 (4th Cir. 1985); United States v. Bradshaw, 541 F. Supp. 884, 886 (D.Md. 1982);' United States v. Board of Trustees of Florida Keys Community College, 531 F. Supp. 267, 275-276; United States v. Weisman, 489 F. Supp. 1331, 1349 (M.D. Fla. 1980).

[26] The plan depicted by Plaintiff's Exhibit 30 calls for the following: (1) removal of the dike around the impoundment by pushing it into the surrounding ditch; (2) removal of culverts from the bank of Obion Creek; (3) removal of most of the levee extending from the southeastern side of the impoundment by pushing it into a parallel ditch; (4) breaching the levee which extends southwest from the impoundment with 10-foot wide gaps every 100 feet; and (5) placement of any excess material in a non-wetland area.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

UNITED STATES OF AMERICA,

PLAINTIFF,

v. CIVIL ACTION
No. 84-0044-P(J)

THOMAS R. LARKINS and
HERBERT M. LARKINS,

DEFENDANTS.

ORDER OF JUDGEMENT

For the reasons stated in the Memorandum Opinion this day entered, the court has found that Defendants Thomas R. and Herbert M. Larkins have violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), and that the United States is entitled to relief therefrom. Accordingly:

1. The defendants are permanently enjoined from making modifications to the wetland sites adjacent Obion Creek in Carlisle County, Kentucky without first securing an appropriate permit from the Army Corps of Engineers in accordance with 33 U.S.C. § 1344.

2. The defendants shall, within six months from date, complete the restoration plan depicted on Plaintiff's Exhibit 30. The plan requires removal of the dike which forms the impoundment by pushing it into a surrounding ditch, removal of culverts from the bank of Obion Creek, removal of most of the levee extending from the southeastern side of the impoundment by pushing it into an existing parallel ditch, breaching the levee which extends southwest from the impoundment with 10-foot wide gaps every 100 feet, and placement of any excess material in a non-wetland area. The defendants shall consult with the plaintiff should they need further clarification of the plan.

3. The defendants are fined the sum of forty thousand dollars ($40,000.00), payable six months from date, provided, however, that the penalty will be lifted if the defendants complete the above ordered restoration plan before payment is due.

IT IS SO ORDERED AND ADJUDGED

DATED 1-16-87

(s) Edward H. Johnstone, Chief Judge
United States District Court

APPENDIX B

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 87-5300
UNITED STATES COURT OF APPEALS
FOR THE SIXTH COURT

United States of America,

Plaintiff-Appellee,

v.

Thomas R. Larkins and Herbert M. Larkins,

Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Kentucky.

Decided and Filed July 22, 1988

Before: MERRITT, KENNEDY AND KRUPANSKY, Circuit Judges.

The court delivered a PER CURIAM opinion. MERRITT, Circuit Judge, (pp. 9-11) delivered a separate concurring opinion.

PER CURIAM. Defendants-appellants Thomas R. Larkins and Herbert M. Larkins (defendants) appealed from the district court's order permanently enjoining them from modifying "wetlands"[1] adjacent to the Obion Creek in Carlisle County, Kentucky, ordering them to restore wetlands they had earlier destroyed, and imposing a penalty of $40.000.[2] The record disclosed the following facts.

This action arose out of alleged violations of Section 301(a) of the Clean Water Act (CWA), 33 U.S.C. § 1311(a), which prohibits the discharge of pollutants, including fill dirt, into navigable waters of the United States and the fresh water wetlands adjacent thereto without first obtaining a permit from the Secretary of the Army, Army Corps of Engineers. 33

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[1] The United States Army Corp of Engineers' regulations defines wetlands as follows:

> (b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similiar areas.

33 C.F.R. 328.3(b)(formerly 33 C.F.R. 323.2(c)).

[2] Under the district court's order of March 16, 1987, the penalty will be lifted if defendants complete the restoration within six months of this court's disposition of this appeal.

U.S.C. § 1344(a). The defendants, brothers, acquired 550 acres of land in the flood plain of Obion Creek, a tributary of the Mississippi River[3] in Carlisle County, Kentucky in 1976. When they purchased the land, Thomas Larkins noted that 10-12 acres were covered with knee deep water. After acquisition of the land, the defendants dug drainage ditches, cut timber, blasted beaver dams, and began filling low spots. In 1980, the defendants began constructing dikes and levees on the land. On February 1, 1982 the Corps notified the defendants that its aerial inspection disclosed that the defendants had been discharging materials into approximately 110 acres of the land which the Corps believed were classified as wetlands subject to the CWA. The defendants nevertheless completed the dikes and levees. The levees formed an 18 acre impoundment or

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[3] Under the CWA, the term "'navigable waters' means waters of the United States...." 33 U.S.C. § 1362(7). In regulations promulgated by the Environmental Protection Agency and the Army Corps of Engineers, "waters of the United States" are defined to include tributaries of navigable waters and the wetlands adjacent to such tributaries. 33 C.F.R. § 328.3(a)(5) & (7)(formerly 33 C.F.R. § 323.2(a)(5) & (7)). *See also* 40 C.F.R. § 230.3 (s)(5) & (7). Because the defendants did not argue that the CWA does not permit the Army Corps of Engineers to exercise its regulatory jurisdiction over wetlands adjacent only to tributaries of navigable waters, this court does not decide that issue.

pond, which collected much of the water that previously saturated the land.

On February 10, 1984, the United States commenced the present action in the United States District Court for the Western District of Kentucky alleging CWA violations as a result of the construction of the dikes and levees. At trial, the government introduced a number of aerial photographs showing standing water on the land where the impoundment was eventually constructed and the land northeast thereof. The defendants acknowledged that much of this land was covered by standing water, but attributed that condition to beaver activity. Photographs taken in 1972 and 1979 also revealed that this area was forested and contained numerous sloughs and depressions which collected standing water.

The government presented three expert witnesses to identify the vegetation depicted in the various aerial photographs. These experts had been trained in identifying vegetation from aerial photographs by its "signature," i.e., the color, shade, tint, and texture of the vegetation. Martin Keller (Keller) testified

that the area was "an area of black willow, buttonbush and several different species of herbaceous aquatic and semi-aquatic plants." Keller further testified that a 1980 photograph was "typical of the many thousands of similar sites that we have seen over the last 10 years of areas such as this, and in every case these areas have been classified as wetlands."

Thomas Welborn (Welborn) of the U.S. Environmental Protection Agency, testified that he had inspected the land in 1984 and discovered an undisturbed area of vegetation consisting of spike rush, wild millet, and nut sedge, all vegetation indicative of wetland conditions. Welborn testified that in a 1980 aerial photograph the signature of this area was the same as the area where the impoundment is now located and the land northeast thereof. Welborn therefore concluded that the entire area was wetlands in 1980.

In 1980, a forested area was located due east of what is now the impoundment which forest was subsequently cleared by the defendants. Expert David Parsons (Parsons) examined aerial photographs of this area and concluded that it was

"palustrum forested broadleaf deciduous seasonally inundated wetlands."

Another government expert witness, Charles Newling (Newling), dug soil samples in 1984 in the northeast area and concluded from the reduced amount of oxygen in the soil that in the past 2,000 years the soil had developed under wetlands conditions. Parsons acknowledged that this oxygen test was incapable of disclosing whether the area had been wetlands for the last 200 years. Welborn took a soil sample east of the impoundment and reached a similiar conclusion. An official Carlisle County Soil Survey compiled by the U.S. Department of Agriculture in 1937 indicated that the entire area north and east of the impoundment was composed of Waverly and Falaya soils which are "hydric" or wetland soil types.

With regard to the land southwest of the impoundment, Newling testified that during a court ordered inspection of the land in May, 1985, he observed water marks or silt marks on the trees approximately 30 inches above ground level. Keller, Welborn, and Parsons all conducted a vegetation survey of this

area and discovered that the predominant vegetation in this area was that which thrived in saturated soil ("group 1 vegetation") and that which could tolerate saturated soil ("group 2 vegetation").[4]

Newling conducted soil tests on this area of land and concluded that this soil also developed under wetlands conditions. Newling also observed that water filled the sample holes while he was taking samples in this area.

The defendants introduced the testimony of two local farmers who stated that flood waters on the property tended to drain away quickly. On cross-examination, both witnesses

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[4] The Corps' Memphis District Guidelines, developed by Keller, divided vegetation into three groups:

> *Group 1.* These species are considered to be the most water tolerant woody species in the District. While the presence of these species on a site does not insure the presence of wetlands, these species are generally consistent as to the sites where they are commonly found (swamps, sloughs and backwater flats).
> *Group 2.* This group includes those species that, while showing varying degrees of adaptation to life in saturated soil conditions, may also be commonly found on more mesic sites which would not be considered wetlands.
> *Group 3.* These species may on occasion be found in wetlands but are not considered to be typically adapted for life in saturated soil conditions (where these species are well established, wetlands are not present).

agreed that, before being purchased by the defendants, the land tended to be covered by standing water.

Following a bench trial, the district court found that the 110 acres in dispute were indeed wetlands subject to regulation under the CWA. The court further concluded that the defendants' construction activities were not entitled to the "farm exemption" under 33 U.S.C. 1344(f) which exempts normal farming activity from the permit requirement so long as no "discharge of dredged or fill material into the navigable waters incidental to any activity [has] as its purpose bringing an area of the navigable waters into a use to which it was not previously subject...." 33 U.S.C. § 1344(f)(2). The court determined that the defendants "constructed the dikes and levees for the purpose of bringing the wetlands adjacent to Obion Creek under cultivation, a use to which the site was not previously subject," and that they were not therefore entitled to the exemption. Their failure to obtain a permit before constructing the dikes and levees was, therefore, in violation of the CWA. *United States v. Larkins*, 657 F. Supp. 76 (W.D. Ky.

1987). The defendants thereafter commenced this timely appeal.

On appeal, defendants first asserted that the district court erred in concluding that the land in question was "wetlands" as defined in 33 C.F.R. § 328.3(b) prior to 1980 because the court failed to examine the amount and frequency of the soil's saturation, i.e., its "hydrology," in making its determination. This assignment of error is without merit. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985), the Supreme Court rejected the notion that 33 C.F.R. § 328.3(b) required that land be frequently inundated to be considered wetlands and concluded that the regulation's only requirement was that "the saturation is sufficient to and does support wetland vegetation." 474 U.S. at 130, 160 S. Ct. at 461. The presence of vegetation that requires saturated soil conditions for growth and reproduction on land adjacent to a body of navigable water is sufficient to bring the land under the regulation's definition of "wetlands." 474 U.S. at 130-31, 106 S. Ct. at 461. *See also United States v.*

Cumberland Farms of Conn., Inc., 826 F. 2d 1151, 1154 (1st Cir. 1987). ("[T]he Corps further extended its jurisdiction over wetlands by eliminating the requirement that the wetland be periodically inundated, requiring only that it be inundated or saturated by surface or groundwater at a sufficient frequency to support vegetation adapted for life in saturated soils."), *cert. denied*, 108 S. Ct. 1016, 98 L. Ed. 2d 981 (1988). Accordingly, the district court properly found that the land adjacent to the Obion Creek was "wetlands" under 33 C.F.R. § 328.3(b) because it was sufficiently saturated to and did support wetland vegetation. Furthermore, given the evidence summarized above, the finding that the land was sufficiently saturated to and did support wetland vegetation was not clearly erroneous. Fed. R. Civ. P. 52(a).

The defendants also argued that the district court erroneously concluded that they were not entitled to the "farm exception" under 33 U.S.C. § 1344(f), which provides, in part:

> (1) Except as provided in paragraph (2) of this sub- section, the discharge of dredged or fill material-
>
> (A) from normal farming, silviculture,

> and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> * * *
>
> is not prohibited by or otherwise subject to regulation under this Section....
>
> (2) Any discharge of dredged or fill material into navigable waters incidental to any activity having as *its purpose bringing an area of the navigable waters into a use to which it was not previously subject*, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

(emphasis added) The district court concluded that because the land had not previously been used as farmland, the defendants were not entitled to the farm exception. Aerial photographs taken before the dikes and levees were constructed showed pooled water and inundated areas and that much of the land was covered by trees. There was no evidence that the land in question had been cultivated for farming.

Defendants nevertheless asserted the land was used for "silviculture," i.e., tree farming, and that when they cleared the land, they were merely harvesting trees. Trees were not re-

planted, they asserted, because they merely made an economic decision to plant more profitable crops, i.e., soybeans, after the trees had been removed. This argument is without merit. The silviculture exception contained in 33 U.S.C. § 1344(f)(1)(A) applies to the *normal* harvesting of timber, not to the activity of clearing timber "to permanently change the area from wetlands into nonwetland agricultural tract for row crop cultivation." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F. 2d 897, 926 n. 46 (5th Cir. 1983) (citations ommitted). *See also* 33 C.F.R. § 323.4(c) ("[A] permit will be required for...the conversion of a wetland from silviculture to agricultural use when there is a discharge of dredged or fill materials into waters of the United States in conjunction with the construction of dikes, drainage ditches or other works or structures used to effect such conversion."). Consequently, the district court did not err in determining that the defendants were not entitled to the farming exception.

This court has considered defendants' remaining assignments of error and concludes that they are without merit. Ac-

cordingly, the judgement of the district court is hereby AFFIRMED.[5]

MERRITT, Circuit Judge, concurring. I want to make an issue clear that the landowner at oral argument expressly declined to raise. I mention it simply to make it clear that we do not reach the issue.

The Clean Water Act does not mention "wetlands," nor does it use any language which explicitly includes "wetlands." Instead, it defines the pollution jurisdiction of the Corps of Engineers as limited to "navigable waters," *see* § 404 of the Clean Water Act, 33 U.S.C. § 1344.

In *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985), the Supreme Court defined the "navigable waters" jurisdiction of the Corps to include "wetlands" adjacent to "navigable" or "open waters," even though the wet area is not caused by flooding or ground water flowing from adjacent

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[5] The defendants are free, of course, to move the district court to stay its order requiring the restoration of wetlands pending their proper application for a permit. Such a stay would, in the event that a permit was issued, prevent the needless destruction of the significant work that went into transforming the wetlands in question into productive farm land.

waters. 106 S. Ct. at 462. The Supreme Court arrived at this expansive interpretation by pointing to the legislative history of § 404, which indicates, in a general way, a desire to adopt legislation for the "protection of aquatic ecosystems." *Id.*

The Supreme Court's actual holding in *Riverside Bayview Homes* is limited, however, by the important fact that the "wetlands" in question in that case were "located *adjacent to a body of navigable water*, since the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to Black Creek, *a navigable waterway.*" *Id.* at 461 (emphasis added). In footnote 8 of its opinion, the Supreme Court reserved the question of the jurisdiction of the Corps of Engineers under § 404 over "wetlands that are not adjacent to bodies of open water." *Id.* at 461 ("[w]e do not express any opinion on that question").

Had the landowners at oral argument not said that they do not raise the issue, this case would present the issue the Supreme Court reserved in *Riverside Bayview Homes.* Obion Creek, so far as we can tell from the record before us, is a

small nonnavigable creek or stream that empties into the Mississippi River many miles away. The land at issue in this case is adjacent to Obion Creek. The Corps of Engineers, as plaintiff, had the burden in this case of proving that the land in question is adjacent to a "body of open water," the phrase used by the Supreme Court in footnote 8 of *Riverside Bayview Homes.*

If this is true, then the Corps has now expanded the definition of "navigable waters" to include any creek or stream or moist area. It has arrived at the precise point predicted in our earlier opinion in the *Riverside Bayview Homes* case, which the Supreme Court reversed. There we said: "Under such a construction [as proposed by the Corps of Engineers] low lying backyards miles from a navigable waterway would become wetlands." *United States v. Riverside Bayview Homes, Inc.,* 729 F. 2d 391, 401 (6th Cir. 1984), *rev'd,* 106 S. Ct. 455 (1985). The Corps's definition has apparently detached and untied the "wetlands" jurisdiction of the Corps from any concept of "open waters" or navigable waters. A farmer's low lying farmland or

a homeowner's low lying backyard - adjacent to a small stream or creek but many miles from any navigable waterway - has apparently been converted into government property no longer subject to control or improvement by the owner without government permission. A statute that does not mention "wetlands" has apparently been read to include simply "moist land adjacent to a creek."

The framers of the Constitution were solicitous of the rights of landowners - especially small farmers struggling for survival - not to have land appropriated by the government. They therefore adopted the provision of the Fifth Amendment of the Constitution prohibiting the taking of private property for public use without just compensation. Although the Supreme Court has stated that "[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense," 106 S. Ct. at 459, the injunction the Corps has been granted in this case will force the Larkins to destroy the terracing work they have done on their land and to restore the land to its original

nonagricultural use. Because farming appears to be the only economically viable use of the land in question, *see Agins v. Tiburon,* 447 U.S. 225, 260 (1980), it is arguable that the Larkins could successfully assert a takings claim if they are not allowed to keep the work they have already done. *See Riverside Bayview Homes,* 106 S. Ct. at 460 n.6 ("Because the Corps has now denied respondent a permit to fill its property, respondent may well have a ripe claim that taking has occurred.") It is arguable that the injunction issued in this case constitutes a taking without compensation. Since the landowner has not raised this issue and at oral argument expressly declined to raise any question about whether Obion Creek is navigable, or constitutes "open waters," the Court's opinion should not be read to decide this issue.

APPENDIX C

No. 87-5300

UNITED STATES COURT OF APPEALS
FOR THE SIXTH COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ORDER
	)	
THOMAS R. LARKINS AND HERBERT M. LARKINS,	)	
	)	
	)	
Defendants-Appellants.	)	

Before: MERRITT, KENNEDY AND KRUPANSKY, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellants, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is **denied.**

ENTERED BY ORDER OF THE COURT

(s) Leonard Green, Clerk

Supreme Court, U.S.
FILED
JAN 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1025

In the Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS R. LARKINS AND HERBERT M. LARKINS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' property falls outside the definition of "wetlands" in 33 C.F.R. 328.3(b) because the wetlands vegetation found on that property would not have been there under "normal circumstances."

2. Whether petitioners were excused from obtaining a permit under Section 404 of the Clean Water Act, 33 U.S.C. 1344, on the ground that their clearing and diking of a wetlands area fell within the exemption in Section 404(f) of the Act for normal farming activities.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B17) is reported at 852 F.2d 189. The opinion of the district court (Pet. App. A1-A27) is reported at 657 F. Supp. 76.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1988. A petition for rehearing was denied on September 19, 1988 (Pet. App. C1-C2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this action, the United States alleged that petitioners violated Section 301(a) of the Clean Water Act (CWA), 33 U.S.C. 1311(a), by filling and diking wetlands without

first obtaining a permit from the Army Corps of Engineers pursuant to Section 404(a) of the CWA, 33 U.S.C. 1344(a). In 1976, petitioners acquired 550 acres of land in the flood plain of Obion Creek, a tributary of the Mississippi River in Kentucky. Pet. App. B3. They immediately began digging drainage ditches, cutting timber, blasting beaver dams, and filling low spots, and in 1980 they began constructing dikes and levees on the land. *Ibid.* In 1982, the Corps advised petitioners that an aerial inspection revealed that they had been discharging materials into approximately 110 acres of land that the Corps considered wetlands subject to the CWA. Petitioners nevertheless completed the levees, which collected much of the water that previously saturated the land (*id.* at B3-B4), and enabled petitioners to cultivate the formerly inundated lowlands (*id.* at A6-A7).

The United States brought this action in 1984, seeking an injunction against further modification of wetlands without a permit, restoration of the wetlands that had been destroyed, and a penalty of $40,000. Pet. App. B2. The principal disputed issue at trial was whether petitioners' property constituted "wetlands" as defined by 33 C.F.R. 328.3(b) (formerly 33 C.F.R. 323.2(c) (1986)), which are subject to the requirements of the CWA, or were instead outside the coverage of the CWA. Pet. App. A2 n.2, A3, A8, B8.[1] Petitioners also contended that, even

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[1] The pertinent regulation provides:

> The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. 328.3(b). Any discharge of dredged or fill materials into covered wetlands is forbidden unless authorized by a permit issued by

if their property constituted wetlands otherwise subject to the CWA, the CWA's "farm exemption," 33 U.S.C. 1344(f), applied. Pet. App. A3, A22-A25, B8.

Because petitioners had refused to allow an on-site inspection before completing the dikes and levees, the government was obliged to rely primarily on aerial photographs and post-filling soil analyses done pursuant to court order. Pet. App. A9. Aerial photographs taken in 1964, 1972, 1979, 1980, and 1981 showed that much of the land in question was subject to inundation. *Id.* at B4, A7 n.6. Government experts trained in identifying vegetation from aerial photographs testified that the color, shade, tint, and texture of the vegetation shown on the photographs (its "signature") identified it as typical wetlands vegetation. Experts trained in soil analysis testified that soil samples taken from the 110 acres in question had developed under wetland conditions over a long period of time, and an official soil survey compiled by the U.S. Department of Agriculture confirmed that the soils in this area were "hydric" or wetland soil types. *Id.* at B6, A10-A12. On-site inspections of areas of undisturbed vegetation confirmed the prevalence of typical wetland species. *Id.* at B6-B7, A15-A16.

Petitioners' evidence consisted chiefly of the testimony of two local farmers who stated that flood waters on the property tended to drain away quickly. Those witnesses admitted, however, that the land in question tended to be covered by standing water before it was purchased by petitioners. Pet. App. B7-B8.

Following trial, the district court found that the 110 acres in dispute were wetlands subject to the CWA. Pet.

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the Corps pursuant to Section 404 of the CWA, 33 U.S.C. 1344. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-124 (1985).

App. A20-A21. The court also concluded that petitioners' construction activities are not entitled to the exemption for normal farming activities found in 33 U.S.C. 1344(f). That provision exempts from the permit requirement the discharge of fill material associated with certain farming, silviculture, or ranching activities. The exemption does not apply, however, if the discharge is incidental to "any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject" and that activity impairs the circulation or reduces the reach of such waters. 33 U.S.C. 1344(f)(2). The court held that petitioners are not entitled to the exemption because they "constructed the dikes and levees for the purpose of bringing the wetlands adjacent Obion Creek under cultivation, a use to which the site was not previously subject," and thereby reduced the reach of navigable waters. Pet. App. A24.

Having held that the construction of the dikes and levees without a permit violated the CWA, the district court ordered petitioners to comply with the government's proposed restoration plan calling for removal of most of the levees. Pet. App. Aa1-Aa2. The court assessed a $40,000 fine, to be lifted if petitioners complete the restoration plan within six months. *Id.* at Aa2.

On appeal, petitioners argued that the district court had failed to examine the amount and frequency of the soil's saturation. The court of appeals, relying on this Court's opinion in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), held that the numerical frequency of inundation or saturation is irrelevant, so long as "the saturation is sufficient to and does support wetland vegegation." Pet. App. B9 (quoting *Riverside Bayview,* 474 U.S. at 130). After reviewing the evidence, the court of appeals concluded that the district court's "finding that the land was sufficiently saturated to and did support wetland

vegetation was not clearly erroneous." Pet. App. B10. The court of appeals also affirmed the ruling that the farming exemption does not apply to construction that converts an area of wetlands to nonwetlands suitable for row crop farming. *Id.* at B12. Judge Merritt concurred, stating that he did not view the court's opinion as reaching the question whether the Corps' jurisdiction under the CWA extends to wetlands adjacent to nonnavigable tributaries of navigable waterways. *Id.* at B13-B17.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners' principal attack on the decision of the court of appeals is that it allegedly eliminates from the Corps regulation defining wetlands the requirement that the water inundating or saturating the land support wetland vegetation "under normal circumstances." As this Court noted in *Riverside Bayview,* 474 U.S. at 130 n.7 (quoting 42 Fed. Reg. 37,128 (1977)), the "normal circumstances" requirement was intended in part "to exclude areas characterized by the 'abnormal presence of aquatic vegetation in a non-aquatic area,' " so that an area would not be classified as a wetland because of "the aberrational presence of such vegetation in dry, upland areas." Petitioners apparently contend that the aquatic vegetation found on their land is attributable to unspecified abnormal circumstances (see Pet. 14).

This case, however, presents no appropriate occasion for this Court to examine the meaning of the phrase "under normal circumstances." Petitioners did not rely in the court of appeals on the allegedly aberrational char-

acter of the vegetation found on their property. They relied instead on the argument that the government had failed to show the amount and frequency of the soil's saturation. Pet. App. B9. Petitioners may not raise in this Court an argument that they did not make below. See *Berkemer* v. *McCarty,* 468 U.S. 420, 443 (1984); *United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970).

Furthermore, there is no evidence that the aquatic vegetation found on the property is abnormal or aberrational. Petitioners argue (Pet. 14) that such vegetation is abnormal unless there is "some evidence of regeneration" or that the vegetation is prevalent "for at least more than one season." But the vegetation at issue in this case was hardly short-lived. Aerial photographs made in 1980 showed a prevalence of wetland vegetation on the site, and an on-ground survey in 1984 confirmed that vegetation that had not been cleared by petitioners was of the same type. Pet. App. A14-A16. Many of the wetland species found were mature trees (*id.* at B5-B6), and the soil analyses showed that the area had been saturated for perhaps thousands of years (*id.* at B6).

Petitioners' argument that this Court's opinion in *Riverside Bayview* and the opinion below eliminate the "normal circumstances" requirement is clearly wrong. *Riverside Bayview* did not eliminate that requirement, but limited it to its intended function, *i.e.,* to distinguish wetlands from aberrational instances of wetlands vegetation in dry areas. 474 U.S. at 130 n.7. The courts below did not reach the "normal circumstances" issue because petitioners never claimed that the wetlands vegetation on their property was an aberration.[2]

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[2] The district court correctly noted (Pet. App. A13-A14) that "normal circumstances" on petitioners' property were ended by petitioners'

2. Petitioners' claims regarding the farming exemption also do not warrant review. Petitioners (Pet. 19) fault the district court for allegedly ignoring evidence that the area was used for cropland from 1977 to 1980, but they cite no evidence for their allegation that it was so used. Likewise, there is no support in the record for their allegation (Pet. 18) that "the site had continuosly [*sic*] been used for silviculture with crops interspersed in areas where trees had not been replanted." As the court of appeals noted (Pet. App. B11), "[t]here was no evidence that the land in question had been cultivated for farming." The record shows instead that, after purchasing the land in 1976, petitioners simply dug drainage ditches, cleared timber, filled gullies, and constructed dikes and levees, all in an effort to make this land suitable for cultivation of soybeans, which commenced sometime between 1981 and 1984. *Id.* at A5-A7 & n.7.

Even if there had been an ongoing farming or silvicultural operation, the farming exemption could not apply to the construction of dikes and levees, as the courts below pointed out (Pet. App. A24, B12). The statute does not exempt a discharge of fill that is designed to bring an area of wetlands into a new use and reduces the reach of wetlands. 33 U.S.C. 1344(f)(2). Hence, the court of appeals (Pet. App. B12) correctly refused to apply the exemption, since the district court found (*id.* at A24) that petitioners "constructed the dikes and levees for the purpose of bringing the wetlands adjacent Obion Creek under cultivation, a use to which the site was not previously subject," and thereby "reduced the reach of wetlands." [3]

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clearing and filling, but this has nothing to do with petitioners' present argument that the wetlands vegetation previously on the property was abnormal.

[3] Contrary to petitioners' suggestion (Pet. 17), it was not improper for the court of appeals to rely on the Corps' 1982 regulatory guidance

Contrary to petitioners' contention (Pet. 20), the decision below does not conflict with *United States* v. *Akers*, 785 F.2d 814 (9th Cir.), cert. denied, 479 U.S. 828 (1986). The Ninth Circuit stated, in dictum, that a permit should not be required for an ongoing farming operation when the farmer simply switches from one wetland crop to another. 785 F.2d at 820. The court held, however, that the construction of a dike for the purpose of drying out a wetland area required a permit. *Ibid.* That is exactly what petitioners did in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1989

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regarding the scope of the farming exemption (47 Fed. Reg. 31,813 (1982) (codified at 33 C.F.R. 323.4(c))). The language of the statute clearly excludes from the normal farming exemption all activities that bring an area of wetlands into a new use and reduce the reach or alter the flow of wetlands. The 1982 Corps regulations, promulgated after petitioners had completed much of their construction, simply give examples of activities that fall outside the exemption, such as building dikes to convert a wetland from silvicultural to agricultural use. The statute itself gave adequate notice that building dikes in order to convert an area of wetlands to a new use would not be entitled to the exemption.

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